

## REMARKS

In the Office Action, claims 1-17 are rejected under 35 U.S.C. § 103 in view of a combination of a number of references. Applicants respectfully submit that the rejection is improper for the reasons set forth below.

Claims 1-17 stand rejected under 35 U.S.C. §103 as being unpatentable over *May* (WO 98/05219) in view of *Quaker Oats* (GB 1327351) and *Bechtel* (US 3,738,847), further in view of *Gutmann* (US 2,421,199), *Froebel* (GB 2,194,125), *Zitin* (US 2,937,095), *Dodge* (US 3,385,712) and *Vickers* (GB 341,760), and further in view of *Ohba* (EP 769252), *Henkel* (GB 1486634), *Mandanas* (WO 94/26606), *Routh* (2,344,901), *McMahon* (GB 1583351), *Erras* (EP 675046), *Hillebrand* (Australia 50797/96), *QP Corp. I* (JP 59-31677) and *QP Corp. II* (JP 61-100174). Applicants note it appears that the Patent Office has withdrawn *May et al.* (WO '521). However, the Patent Office has also cited five new references. Accordingly, the Patent Office has now maintained the obviousness rejection in view of the 16 references.

Of the pending claims, claims 1, 2, 6 and 9 are the sole independent claims. Claims 1, 2 and 6 each relate to a canned pet food product that has an upper end and a lower end; and claim 9 relates to a process for producing a canned pet food product. More specifically, the canned pet food product as defined in claim 1 includes an outer tubular phase which is substantially solid and which extends from the lower end to the upper end and which includes an edible source of carbohydrate and protein; and an inner phase that extends from the lower end to the upper end and includes an edible source of carbohydrate and protein wherein the inner phase has an appearance different from the outer phase and extends within the outer phase. Claim 2 further includes that the product is obtained by a process that includes filling the outer phase into a can; forming a bore into the outer phase for providing a tubular outer phase; filling the interface into the bore of the tubular outer phase; sealing the can; and retorting the sealed can.

The canned pet food product as defined in claim 6 includes an outer, tubular phase that extends from the lower end to the upper end and which includes a substantially solid, thermally gelled mixture of carbohydrate and protein; and an inner phase which extends from the lower end to the upper end and which is in the form of chunks of a formulated emulsion product in gravy wherein the inner phase has an appearance different from the outer phase and extends within the outer phase.

The process as defined in claim 9 includes the steps of filling into an outer phase including an edible source of carbohydrate and protein; forming a bore into the outer phase for providing a tubular outer phase; filling an inner phase including an edible source of carbohydrate and protein into the bore of the tubular outer phase wherein the inner phase has an appearance different from the outer phase; sealing the can and retorting the sealed can.

Applicants have recognized the need for canned pet food products which have new and interesting appearances to further stimulate interest therein. See, Specification, page 2, lines 5-6. The pet food product and processes of making same as required by the claimed invention have the advantage of having an attractive appearance of two or more discrete phases of different appearances, one within the other. Since the phases are substantially discrete, the product does not have the homogeneous appearance of conventional pet foods. Further, the pet food is suitable for larger cans in which the height of the can is at least as large as the diameter of the can. See, Specification, page 2, lines 15-19.

In contrast, Applicants believe that the cited art, even if combinable, fails to disclose or suggest the claimed invention. As even admitted by the Patent Office, the primary *May* reference fails to disclose the outer, tubular phase features as required by the claimed invention. Further, *May* merely discloses that the recess can extend from the upper layer through the base layer depending on processing conditions. See, *May*, page 9, lines 12-17. However, this is optional as further disclosed in *May* on page 2 at lines 26-30.

Moreover, even if the recess extends through the base layer, there is still at least part of the upper layer that is not displaced from the side wall of the can by the base layer. Otherwise, the canned pet food would provide vertical layering (i.e., a filling into a recess) rather than horizontal layering as disclosed in *May*. Indeed, *May* discloses clearly defined upper and base layers such that, after opening the can and dispensing the pet food therefrom, what was the base layer becomes the upper layer. In this regard, the consumer is presented with an attractive topping of solid food pieces in gravy above a clearly defined layer of a substantially solid food stuff. See, *May*, page 2, lines 20-25.

This clearly contrasts the claimed invention. As previously discussed, the canned pet food as claimed requires, in part, that both of the outer and inner layers extend from the lower end to the upper end of the canned pet food. Moreover, in contrast to *May*, the canned pet food of the claimed invention is suitable for use in larger cans where the height of the can is at least as

large as the diameter of the can. See, Specification, page 2, lines 1-19. Indeed, larger cans would not allow as easily, if at all, for the upper and base layers to be shaken out of the can and into the pet's bowl or dish as disclosed in *May* on page 2 at lines 20-22. Again, the primary focus of *May* relates to a canned pet food produce with clearly defined upper and base layers such that, after opening the can and dispensing the pet food therefrom, what was the base layer becomes the upper layer, thus presenting the consumer with an attractive topping of solid food pieces in gravy above a clearly defined layer of a substantially solid food stuff as discussed above. Based on at least these reasons, *May* is deficient with respect to the claimed invention.

Further, Applicants do not believe that the Patent Office can rely on the remaining cited references, alone or even if combinable, to remedy the deficiencies of *May*. At the outset, the Patent Office relies on *Quaker Oats* and *Bechtel* in alleged support of the deficiencies of *May*, particularly with respect to the outer and inner layer features of the claimed invention. The primary focus of these references relates to a pet food of hash type that contains a center core of eggs. *Quaker Oats*, col. 1, lines 12-15; and *Bechtel*, col. 1, lines 34-36. But, nowhere do these references provide that the egg core extends from the top to the bottom of the can in contrast to the inner and outer layers as claimed. See, Figs. 1-8 of *Quaker Oats* and *Bechtel*.

Further, the Patent Office has cited to five new references, namely *Gutmann*, *Froebel*, *Zitin*, *Dodge* and *Vickers*, in alleged support of *May*. Yet, none of these reference even relates to canned products, let alone all but one do not even relate to pet food products, as required by the claimed invention.

For example, the primary focus of *Gutmann* relates to a method of preserving eggs, particularly to a method in which the white and yokes of eggs are preserved in coagulated or hard-boiled condition. In this regard, the main object of *Gutmann* is to convert the eggs into a condition in which they can be easily and safely shipped and stored for an unlimited period of time. See, *Gutmann*, column 1, lines 1-8.

With respect to *Froebel*, this references discloses a co-extruded dog treat. However, *Froebel* distinguishes between different categories of pet food, most notable dry, wet and semi-moist as disclosed on page 1. Indeed, with respect to canned pet foods, *Froebel* discloses various disadvantages, and further suggests that canned products are "unsuitable for use as treats". See, *Froebel*, page 1, line 56-57. Moreover, the primary focus of *Froebel* is to produce semi-moist products that can be used as a treat (See, *Froebel*, page 1) wherein this type of

product is co-extruded with a relatively hard outer skin, and thus not suitable for canning. See, *Froebel*, Examples 1-3.

With respect to *Zitin*, the primary focus of this reference relates to a cheese core surrounded by meat. See, *Zitin*, col. 1, lines 15-19. The outer shell meat material is inserted using known molding techniques as applied to a casing and not a can. See, *Zitin*, cols. 1 and 2. The stuffed casing is then cooked. The mold is withdrawn and molten cheese is filled in the solidified meat bore. See, *Zitin*, col. 2, line 52 to col. 3, line 10. Moreover, Applicants question whether *Zitin* and *May* should be combined in the first place. Indeed, one skilled in the art would not be inclined to modify the horizontal arrangement (i.e., upper and base layers) of *May* based on the teachings of *Zitin* directed to a vertical arrangement, that is a cheese core surrounded by meat, as disclosed in *Zitin* and discussed above.

With respect to *Dodge*, the primary focus of this reference relates to a cooked egg roll. See, *Dodge*, col. 1, lines 12-14. Further, the *Dodge* product is wrapped and thus not canned in contrast to the claimed invention. As disclosed in *Dodge*, the entire product is completely enclosed in a flexible, synthetic plastic. See, *Dodge*, col. 2, lines 29-34. Indeed, the synthetic plastic outer wrapper can be either initially tube like of a selected cross-section, or in the form of a strip that is formed into a tube like form of a selected cross-section adjacent the extrusion nozzle. See, *Dodge*, col. 4, lines 4-7.

Moreover, like *Zitin*, *Dodge* relates to a food product with a vertical layer arrangement. Indeed, in *Dodge's* egg roll structure, the outer layer does not extend from the top end to the bottom end. See, *Dodge*, Figs. 1 and 2. This is due to packaging constraints such that the egg yolk core can be seen in addition to the egg white portion (i.e., albumen) of the egg roll. In this regard, the primary purpose of *Dodge* is to produce a hard-cooked egg roll packaged in film which would represent enough convenience for both residential and commercial use. See, *Dodge*, col. 1, lines 32-42. Thus, Applicants believe that one skilled in the art would not be inclined to combine *May* with *Dodge*, let alone modify *May* in view of *Dodge*, contrary to the Patent Office's position.

With respect to *Vickers*, this reference primarily relates to meat rolls (i.e., butchers meat, such as beef, veal, etc.) and thus not to canned products, let alone canned pet food products as required by the claimed invention. See, *Vickers*, col. 1, lines 11-16. The meat roll combines course particles and finer size particles in visually separate phases (See, *Vickers*, Figs. 1 and 2)

as an exercise in taste improvement as disclosed in *Vickers* at col. 1, line 53 to col. 2, line 63. Indeed, why would one skilled in the art want to combine *Vickers* with *May* in the first place where in *May* parallel superimposed layers are formed in contrast to an annular-type configuration as disclosed in *Vickers*.

Further, Applicants believe that the Patent Office has improperly relied on the remaining references, alone or in any hypothetical combination, to further remedy the deficiencies of *May*. The Patent Office appears to rely on these references in support of the position that the outer, tubular features of the claimed invention are an allegedly obvious matter of choice and/or design. Even if combinable, clearly these references are deficient with respect to the claimed invention as well. Indeed, some of these references do not even relate to food products, let alone pet food products. For example, *Henkel* merely relates to a cosmetic; *Mandanas*, like *Henkel*, has nothing to do with food, particularly pet foods, but merely relates to dispensing a viscous paste from containers, such as squeezable tubes; *Routh* merely relates to ice cream and products thereof; *Errass* merely relates to a condiment product that is dispensed from a tube; and the *QP Corp.* references relate to peanut butter and products thereof. Therefore, Applicants do not believe one skilled in the art would consider that references unrelated to pet food have any relevance with respect to the specific limitations of the canned pet food product and methods thereof as defined in the claimed invention.

To arrive at the claimed invention, it is respectfully submitted that the Patent Office has simply pieced together the cited art by selectively picking and choosing teachings of each of the references in an attempt to explain what the claimed invention discloses. The Court of Appeals for the Federal Circuit has criticized this motivation to combine analysis as being “hindsight reconstructive” because the motivation to combine the references was first disclosed in the present invention. *In re O’Farrell*, 853 F.2d 894, 902-903 (Fed. Cir. 1988).

At the outset, the sheer number of 16 references, in total, suggests that the rejection is mere hindsight reconstruction of the claimed invention. Indeed, the Patent Office has increased the number of cited references from 13 to 16. If the Patent Office needs to piece together this many references, then the claimed invention must be non-obvious.

Further, the principal reference is deficient with respect to the specific features of the claimed invention, particularly with respect to a canned pet food product with outer and inner phase features as claimed. With respect to the secondary references, Applicants believe that

these references are deficient as well. Indeed, a number of these references do not even relate to pet food products, let alone canned pet food products, and even some do not even relate to food products. Therefore, Applicants believe that one skilled in the art viewing the cited art would not be inclined to modify the cited art to arrive at the claimed invention.

Based on at least these reasons, Applicants believe that the claimed invention is distinguishable over the cited art. Therefore, Applicants respectfully submit that the cited art, even if combinable, fails to render obvious the claimed invention.

Accordingly, Applicants respectfully request that the obviousness rejection be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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